

69-3100-6701-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Lloyd R. Harr,

Petitioner,

v.

City of Edina,

Respondent.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on October 5, at 9:30 a.m. at the Office of Administrative Hearings, 100 Washington Square, Minneapolis, Minnesota.

William L. Lucas, Harvey, Thorfinnson & Lucas, P.A., Marquette Bank Building, Suite 400, 6640 Shady Oak Road, Eden Prairie, Minnesota 55344, appeared on behalf of the Petitioner, Lloyd R. Harr. David J. Lauth and Mark B. Thomas, Dorsey and Whitney, 220 South Sixth Street, Minneapolis, Minnesota 55402, appeared on behalf of Respondent, City of Edina (the City). The record closed on this matter on November 14, 1994, upon receipt of the final reply brief.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of Veterans Affairs shall not be made until the Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Bernie Melter, Commissioner, Department of Veterans Affairs, Veterans Service Building, 20 West Twelfth Street, St. Paul, Minnesota 55155-2079, telephone number (612) 297-5828.

STATEMENT OF ISSUE

Whether Respondent is required by Minn. Stat. § 197.455 to pay Petitioner backpay for the period between Petitioner's suspension and his discharge from Respondent's employ.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. Lloyd R. Harr served on active duty in the U.S. Marine Corps from March 4, 1971, to April 14, 1972. Exhibit 22. Harr received an honorable discharge. Id.

2. Harr worked for the City in its Park Maintenance Department as a Landscaping Equipment Operator. Harr was employed in that capacity from 1985 through June 19, 1992.

3. On December 30, 1986, Harr was arrested for driving while under the influence of alcohol. Due to the arrest, Harr was not able to report for work. A disciplinary hearing was held on January 8, 1987, and Harr was suspended for two days. In addition, the City requested proof that Harr was participating in chemical dependency treatment. Harr returned to work after the suspension.

4. On May 28, 1990, Harr was arrested for driving while under the influence of alcohol. Harr's driver's license was revoked on June 4, 1990. Harr plead guilty to the charge of driving while intoxicated on July 27, 1990.

5. On June 22, 1990, the City notified Harr that a disciplinary hearing was scheduled for June 27, 1990. As a result of that hearing, the City suspended Harr for thirty working days, beginning July 2, 1990. The following conditions were imposed on Harr's ability to return

1. Verification that you have continued to seek substance abuse treatment.
2. Verification that you have continued to participate in Alcoholics Anonymous.
3. Present a valid work permit for driving.
4. Present yourself in a clean and rested manner, prepared to start the work day on time.

Exhibit 8.

6. The July 2 memorandum setting out the suspension and conditions for Harr's return closed with the following paragraph:

It is my strong hope that you can work through your problems. I must say, however, that failure to comply with any of the above mentioned terms at the time of your return or at any time thereafter, will result in your termination.

Exhibit 8.

7. At the time of his 1990 arrest, Harr surrendered his driver's license. Exhibit 10. He was issued a seven-day temporary permit that same day. Id. That permit was cancelled and not renewed on June 4, 1990. A one year period of rehabilitation was required by the Minnesota Department of Transportation before Harr would be eligible to have his license reinstated

Id. However, at the time of his suspension, Harr did not inform the City that he would not be able to drive for a year. Harr's driving privileges were reinstated on July 21, 1991. Id.

8. On June 1, 1990, following his suspension from work, Harr began chemical dependency treatment and completed the first phase of that treatment in eight weeks of counseling. Harr did not complete the second phase of that treatment, consisting of group therapy, due to the lapse of his insurance.

9. The City then learned that Harr's license was not going to be reinstated for some period. On October 4, 1990, the City gave Harr notice that his employment would be terminated and that he had the right to a hearing under Minn. Stat. § 197.46 (the Veteran's Preference Act). The notice stated that the City was prompted to seek a discharge because it was "informed recently by you that the State is not going to reinstate your ... drivers license ...." Exhibit 11. As stated in the notice, the basis for the termination was Harr's lack of a driver's license. On November 14, 1990, Harr requested a veteran's preference hearing.

10. On December 14, 1990, the City provided Harr with a supplemental statement of reasons for termination. Exhibit 13. These reasons are the loss of a driver's license, the impact of Harr's driving violations on his employability, and the failure to satisfy conditions for return from the suspension.

11. The City requested, by letter, that Harr select a person to sit on the veteran's preference hearing panel. Exhibit 14. The letter was sent on December 14, 1990.

12. On June 7, 1991, the City sent a follow-up letter requesting Harr to choose a panel member. On July 9, 1991, another letter was sent to Harr by the City requesting that he choose a panel member or be terminated for failure to cooperate. Exhibit 16. A third letter was sent on July 18, 1991, requesting Harr make his choice. A fourth such letter was sent on September 19, 1991. Harr chose a panel member at the end of September, 1991.

13. A veteran's preference hearing was held on the City's proposed termination of Harr on May 4, 1992. Both Harr and the City were represented by counsel. Witnesses were called by both parties. A written decision was rendered by the hearing panel that discussed the facts of the case and gave the reasons for the panel's decision.

14. Harr appealed the decision of the veteran's preference panel to the Hennepin County District. Judge Lucy Weiland affirmed the order of the panel on February 22, 1993.

15. Harr has not received a paycheck from the City since he was suspended on July 2, 1990. At the time of his suspension, Harr earned \$12.8 per hour. Overtime was available, and was either paid at time-and-a-half or taken out as compensatory time at a rate of 1.5 hours for each overtime hour worked. In the six months prior to his suspension, Harr had worked 39 hours of overtime. Exhibit 28. In 1989, Harr worked 89 hours of overtime. Id.

16. On May 27, 1992, Harr filed a Petition with the Commissioner of Veterans Affairs asserting that his rights under the Veterans Preference Act had been denied by the City. The Commissioner issued a Notice of Petition and Order for Hearing on June 16, 1992.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction over the subject matter of this hearing, pursuant Minn. Stat. §§ 14.57 and 197.481.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. Petitioner is an honorably discharged veteran and entitled to the protections of Minn. Stat. § 197.455.

4. Petitioner was afforded a veterans preference hearing prior to termination as required by Minn. Stat. §§ 197.455 and 43A.11.

5. Petitioner was properly suspended by the City for his failure to appear for work and failure to retain his driver's license. The suspension contained conditions on return to work that were reasonable and job-related and did not reflect an intent to remove the Petitioner from his employment with the City at the time.

6. Petitioner did not meet the conditions of return after the term of suspension set by the City.

7. The City did not violate Minn. Stat. § 197.455 by not paying Petitioner between the date of his suspension and the date of his termination.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

That the Commissioner DISMISS the Petition of Lloyd R. Harr for relief under the Veterans Preference Act.

Dated this 5th day of December, 1994.

/s/

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STEVE M. MIHALCHICK  
Administrative Law Judge



Reported: Taped, transcribed by  
Mary Ann Hintz  
Andover, Minnesota  
1 Volume

MEMORANDUM

The only issue presented by Petitioner's claim is whether the City must pay him for the period between his suspension and his termination. Petitioner presents two arguments in favor of his position. First, that the Veteran's Preference Act prohibits suspensions without pay when a discharge proceeding is pending. Second, that the City's conditions on returning from his suspension rendered the suspension a removal.

Petitioner relies upon the holding in Mytling v. Wolf, 342 N.W.2d 120 (Minn. 1984), to support his contention that any suspension pending a discharge must be with pay. Respondent argues that the holding in Mytling does not apply to the facts of this matter.

The holding in Mytling is express and succinct. The Minnesota Supreme Court stated:

We hold that, when a suspension without pay occurs while a discharge proceeding is pending and the same employee misconduct is substantially involved, the practical effect is to accelerate a discharge before a hearing, and under such circumstances the suspension, to the extent it purports to be without pay, is contrary to the Veterans Preference Act and is invalid.

Mytling, at 123.

In his case, the suspension came on July 2, 1990. The terms for reinstatement after thirty working days were expressly stated and are reasonably related to the job. The first notice of a discharge came on October 4, 1990, after the City discovered that the State would not issue Harr a driver's license. Not only was there no discharge pending when the suspension without pay occurred, but Harr had the opportunity to meet the conditions of reinstatement at any time after August 13, 1990. The discharge was motivated by Harr's failure to return from suspension under the conditions set by the City. Under the holding in Mytling, the City is not obligated to pay Petitioner during the period of his suspension.

The Minnesota Supreme Court, in Myers v. City of Oakdale, 409 N.W.2d 848, 850-51 (Minn. 1987), held that:

Under the Veterans Preference Act, a veteran is removed from his or her position of employment when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to return to the job.

By requiring Harr to have a valid driver's license as a condition of return from the suspension, the City had inadvertently made Harr's return unlikely

improbable. At the time of his suspension Harr had known for almost a month that he would not be eligible for a driver's license until July, 1991. Harr avoided informing the City when he was suspended that he would not be able to get a license. The City did not learn of this fact until late September and then promptly initiated a discharge.

The City did not intend to remove Harr by imposing conditions on his return. Rather, the City's conditions are all related to Harr's position and performance. Harr argues that having a driver's license is not a requirement of that position, but that issue was decided by the Hennepin County District Court in the appeal of Harr's discharge hearing. Collateral estoppel applies to the issue and Harr cannot reopen the dispute. Harr cannot rely upon his concealing his ineligibility to return to work to create a period where he must be paid when he cannot work.<sup>1</sup>

Harr was afforded a hearing at the time of his suspension. The suspension was appropriate in light of Harr's conduct. Reasonable conditions were placed upon Harr's return to his position. Harr knew he would not be able to meet those conditions and the City did not know. Once the City learned Harr would not be able to return, it notified Harr of his right to a veteran's preference hearing. The City's actions in this matter do not warrant an award of backpay to Harr. Therefore, the Judge recommends that Harr's Petition be DISMISSED.

S.M.M.

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1/ Even if such a period of payment pending discharge were required under the Veterans Preference Act, Harr's delay in choosing a panel member would limit the period for which he must be paid. The period would start at the end of Harr's thirty-work-day term of suspension and run to the likely date of the decision by the hearing panel, assuming Harr acted promptly in choosing a panel member.

member. While laches does not apply in veterans preference matters where notice of a hearing has not been given, notice was given here and Petitioner unduly delayed in choosing a panel member. Requiring an employer to pay an employee as the employee frustrates the hearing process is inequitable.